

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

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UNITED STATES OF AMERICA,

Appellant,

vs.

JESSIE B. BOSHART, AS ADMINISTRATRIX OF THE ESTATE
OF AMANIUEL BOSHART, DECEASED,

Appellee.

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BRIEF OF APPELLEE.
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DAVID SPAULDING,
P. O. Box 1, West Los Angeles.

Attorney for Appellee,

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BRIEF OF APPELLEE.

STATEMENT.

Amaniuel Boshart, deceased, hereinafter called the insured, paid premiums on a policy of Government life insurance until his death. This contract insured against two contingencies. Death and total permanent disability.

The insured believing himself within his policy, totally and permanently disabled, made claim for the total and permanent disability benefits. His claim was denied. On December 30, 1932, he filed suit seeking monthly disability benefits and a waiver and return of premiums as provided in his contract of insurance. By his complaint he alleged total permanent disability from and after April 21, 1932. His premium payment in 1932 was in the amount of \$27.60 per month. [R. p. 34.]

While his action was pending and during the month of December, 1933, the insured died. Thereafter, Jessie B. Boshart, his wife, as administratrix of his estate, substituted as plaintiff. The administratrix sought for the estate of the insured, disability payments due the insured, and a return of premiums paid subsequent to the date of total permanent disability.

A jury was waived and from the evidence submitted, the court found that under the terms of the insurance contract, the insured was entitled to disability benefits from and after November 5, 1932. A judgment was entered for disability payments and a return of premiums paid.

In this appeal it is not disputed that the insured was entitled to disability payments and a return of premiums paid subsequent to November 5, 1932. The contention is that because the insured died before his action could be heard, his estate may not recover that which the insured could have recovered had he lived.

QUESTION PRESENTED.

May an action which has been instituted by an insured for disability benefits under a contract of Government life insurance, and where the insured dies before the action is heard, be carried to a conclusion by the insured's personal representative. (a) May the personal representative of the insured recover total permanent disability benefits which were payable to the insured during his lifetime. (b) May the personal representative of the insured recover premiums paid by the insured on his policy between the date of total permanent disability and the date of death after a denial of the right to recover said premiums by the insurer.

STATUTE INVOLVED.

Section 19 of the World War Veterans' Act as amended July 3, 1930 (38 U. S. C. A. Sec. 445) provides in part:

“In the event of disagreement as to claim, including a claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder, an action on the claim may be brought against the United States * * * and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies.”

ARGUMENT.

Here, in the same contract, two types of insurance is provided. By the terms of the contract, disability payments are to be deducted from the face amount of the policy. The insured here, during his lifetime, became entitled to the disability provisions of his policy. The installments due prior to his death became vested in him. (*Cassarello v. United States* (D. C. Penn.) 271 Fed. 486, affirmed 279 Fed. 396 (C. C. A. 3) .)

During the trial of the case, the contention was that the insured had not become totally and permanently disabled, and that therefore, the policy had not matured prior to his death. It was by a supplemental request for special finding of fact made on April 27, 1936, that the present point was raised. [R. p. 32.] The main case was tried on March 17, 1936. [R. p. 21.]

It is the contention of the appellee that, save for the condition in the contract that disability payments due and payable prior to death are to be deducted from any amount due upon death, the two insurance provisions should be treated separately. That total permanent disability is as much insured against as death. That total permanent disability while the policy is in force matures the policy equally as does death. (*Boyett v. United States*, 86 Fed. (2d) 66 (C. C. A. 5).) That the right to disability payments to the insured or his personal representative, and a waiver of premiums, is dependent entirely on the question of disability and proof thereof.

In considering the disability provisions of the policy alone, there is nothing which would tend to show that it was contemplated that property rights of an insured under this contract should be treated differently than any other property rights of a deceased individual. The general rule of law is that rights of a deceased individual may be enforced by his personal representative. That payments due a deceased individual may be paid to his estate. (*United States v. Wilson*, 85 Fed. (2d) 444-445 (C. C. A. 9).)

In examining the disability provisions of the policy, there is found on the face of the policy under Mode of Payment:

“This insurance is *payable* in monthly installments of \$57.50 (hereinafter called the monthly installment) in the event of the total permanent disability of the insured * * *”

The remaining provisions under this head refer only to insurance which has matured because of death. Here, it was contended by the insured, and now admitted by the appellant, that this insurance matured by reason of total permanent disability.

The next paragraph dealing with disability payments on the face of the policy is entitled Disability Benefits to the Insured, as distinguished from payments to be made to a beneficiary. It provides:

“Upon due proof of the total permanent disability of the insured while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability, shall be waived.”

On the inside of the policy under Total Permanent Disability, the policy provides:

“The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months, shall be refunded without interest.”

The exception, we submit, contained under the total permanent disability benefits of the policy on the first page, are the limitations contained in the same provisions on the inside of the policy limiting the recovery to a period

not exceeding six months prior to the receipt of due proof. Thus making not disability, but the receipt of proof, the test of payment.

The death provisions of the policy are entirely consistent with a payment of insurance and a return of premiums to the insured or his personal representative, as distinguished from the beneficiary, in the event the policy matures by disability prior to death. Under Death Benefits to Beneficiary, page 1 of the policy, is provided:

“If Optional Settlement 1, 2, or 3 has been selected, payment shall be made accordingly, subject to deduction on account of disability payments.”

It is submitted that in using the word “paid” in the death provisions of the contract, it was contemplated by the parties that benefits due and “payable” would be paid. In making the contract it was not contemplated due benefits would be withheld. It was assumed that *that which ought to have been done would be regarded as done*. Nothing appears inconsistent with a payment of disability benefits to the insured or his personal representative which may accrue prior to death. If it had been the intention of the parties that death should in any way alter the vested rights of the insured, that fact, reasonably, would have appeared plainly in the policy.

The insured knew he was a sick man when he filed his suit. He had claimed to the appellant that he had been totally and permanently disabled since January 6, 1930. [R. p. 23.] He knew that for certain purposes it had

been admitted by the appellant's rating agency that he was in fact totally and permanently disabled, and had been since April 21, 1932. [R. p. 30.] With these facts before him, with knowledge that payments for disability benefits would be deducted from the optional settlement at time of death, he took affirmative steps to take from his beneficiaries and place in himself that portion of his insurance due between the date of his disability and the date of his death, together with premiums paid subsequent to his disability. He asked by his complaint herein, and his policy, that his beneficiaries receive in a lump sum his insurance, less the amount due him personally. The amount due as disability he desired for himself or his estate.

The contention of the Government might more reasonably apply where an insured, although substantially disabled, had died without claiming for himself the benefits of his disability insurance, and where he had expressed no desire other than that his insurance and all of it, be paid to his named beneficiaries.

But here the insured did all in his power to obtain for himself the amount of insurance he believed was his due. He paid premiums relying on the provisions of the contract which said these premiums would be refunded. Not paid to the beneficiary as death benefits. The insured did all in his power to claim for himself and away from his beneficiaries the amount of insurance which had accrued to him since the date of his total permanent disability.

RETURN OF PREMIUMS.

It is not now disputed that the insured was totally and permanently disabled for a substantial period of time prior to his death. It is now conceded that the Government has no right under the contract to premiums paid subsequent to the date of disability. But such was not the contention at the time of trial. There the contention was [R. p. 40]:

“* * * that the death claim take precedence over the disability claim and that bars recovery of any premiums paid prior to his death.”

However, the date from which a recovery of premiums may be had and the date of total permanent disability, are based on the same contingency. Only by an adjudication of the disability provisions of the policy can it be determined when a waiver of premiums commenced. In any event, the insured left to his beneficiaries only that amount of insurance due after a deduction for payments due prior to death. A waiver of premiums, under the facts here, should have been made prior to death and thus should have been saved to the insured or his estate.

It is argued that the long continued and consistent practice of the Veterans' Administration has been contrary to the trial court's conclusion herein. If such has been the consistent practice, it would seem to have been little known or understood by those charged with the responsibility of carrying out the provisions of the insurance contract.

In communication from a chief attorney of the Veterans' Administration to the acting solicitor of the Vet-

erans' Administration (Defendant's Exhibit D) under date of May 22, 1934 [R. p. 29] is this comment:

“* * * and if this date be as matter of fact the beginning of permanent total disability, there would of necessity be a refund of premiums due subsequent to that date in addition to the payments of disability benefits under the insurance contract from the date of alleged permanent and total disability.”

Under date of September 7, 1934 [R. p. 26] the acting solicitor says:

“However, in view of his death, and according to the terms of the policy, no advantage will be gained under said policy in now seeking a total and permanent disability rating for insurance purposes and there can be no refund of any premiums paid prior to the death of the veteran.”

In the trial court, the contention was [R. p. 40]:

“That the death claim takes precedence over the disability claim and that bars recovery of any premiums paid prior to his death.”

In this court it is said:

“The Comptroller General appears to have varied his interpretation of the policy with reference to whether premiums subject to refund are payable to the insured's estate, or are to be retained by the Government. * * * furthermore, retention of such premiums by the Government would seem inconsistent with the mandatory provisions in paragraph 11 and 11a that they ‘shall be refunded’.”

The appellant here cites an opinion of the comptroller general wherein it is said:

“* * * generally that any unpaid installments of insurance which may accrue to the insured because of his permanent total disability before his death, are payable to the personal representative of his estate, and not to the death beneficiary of the policy.”

The appellant relies on a decision of the comptroller general under date of June 27, 1922. But states that that decision has been varied and that in any event, a substantial portion of that decision should not be the law. It is respectfully submitted that the evidence before this court shows that there has been no consistent practice on the part of the Veterans' Administration in regard to the question here involved.

Furthermore, it is respectfully submitted that, to follow the construction contended for by the appellant, would deprive an insured under a policy of converted Government insurance of valuable rights. If the law is established that the rights to disability benefits are based on the life of the insured, rather than on the degree of his disability, it would in many cases be a useless gesture on the part of an insured to make claim and bring suit, for during what appears to be the last year or two of his life, no matter how badly disabled he may be, nor how clear the defendant's obligation, the expense and effort of litigating that claim would not be worth while if the rights involved were to die with the insured. It is true the appellant now agrees that the Government has no right to

premiums paid subsequent to the date of total permanent disability. But without a right to dispute the date of total permanent disability, the right to a return of premiums subsequent to the date of total permanent disability, becomes an empty concession. The practical effect of the construction contended for by the appellant, is to eliminate in many cases the right of an insured to litigate his contention of disability within the policy, and to insure to the Government insurance premiums regardless of whether or not total permanent disability exists.

The contract in question is, in all of its aspects, a usual commercial policy of insurance. The insurance coverage as well as the premium charge is substantially the same as ordinary insurance contracts entered into between private parties. It is submitted, unless opposed to the plain terms of the contract, usual principles of law should govern in regard to the benefits of the contract. Should it be held that benefits due the insured under this contract may not be recovered by the personal representative of the estate, it would be an exception to all benefits allowed under the World War Veterans' Act. (*United States v. Wilson, supra.*) This despite the fact that this contract is intended to be the most commercial of all the relationships between the veterans of the World War and the Government.

CONCLUSION.

In conclusion, it is respectfully submitted that the personal representative of the insured seeks merely to carry to a conclusion, rights asserted by the insured in his lifetime, and to claim for the estate of the insured that which the insured claimed for himself. That in face of express and unmistakable provisions in the contract insuring against disability as well as death. In face of plain statements that in the event of disability, installments are due the insured and not the beneficiary. In face of plain statements that after disability, premiums are not due but waived. In face of an insured's efforts through all the avenues at his command to enforce these provisions of his contract. That because death ensued before an insured's action could be heard, these rights in the contract should not be waived. The policy is plain that the insured left to his beneficiary in a lump sum, only that amount of insurance which was not due the insured in his lifetime. It is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

DAVID SPAULDING,

Attorney for Appellee,

P. O. Box 1, West Los Angeles.